IN THE HIGH COURT OF BOMBAY AT GOA.

CRIMINAL APPEAL NO. 49 OF 2002.

Vishnu Gaude,
Central Jail, Aguada. ... Appellant.

Versus

State. ... Respondent.

Mr. Rohit Bras De Sa, Advocate for the Appellant.

Mr. S.N. Sardessai, Public Prosecutor for the Respondent/State.

Coram : A.M. KHANWILKAR AND
P.V. HARDAS, JJ.

Date : 12th November 2003.

ORAL JUDGMENT (PER HARDAS, J.)

The appellant, who stands convicted by the IInd Additional Sessions Judge, South Goa, Margao, by Judgment, dated 5th September 2000, in Sessions Case No. 2 of 1998, for an offence punishable under Section 302 of the Indian Penal Code and sentence of imprisonment for life and fine of Rs. 5,000/- with a default stipulation to undergo rigorous imprisonment for 6 months for failure to pay fine, has filed the present appeal challenging his aforesaid conviction and sentence.

2. The facts in brief, as are necessary for the decision of this appeal, are set out hereunder:-

P.W.21 P.I. Rohidas Patre was in-charge of Maina/Curtorim Police Station. On 21st December 1997,

he was deputed for V.I.P. bandobust and had received a message that a murder had taken place at Raia. He returned to the police station. One P.S.I. Malsekar had brought the accused to the police station and had referred him for medical examination. P.W.21 P.I. Patre arrested the accused and drew the arrest panchanama in the presence of P.W.6 Somnath Raikar. The arrest panchanama and the attachment of the clothes of the accused is at Exhibit P.W.6/A. The clothes of the accused are at M.O.1 and M.O.2, which are shirt and pant respectively. On the next day, that is, on 22nd December 1997, the panchanama of the scene of offence, at Exhibit P.W.2/A, in the presence of P.W.2 Premanand Naik was drawn. From the scene of offence leather chappal (M.O.9) and rubber chappal (M.O.10) came to be attached. The photographs were taken by P.W.10 Ganadeep Xeldenkar. Thereafter, at the Goa Medical College, inquest panchanama, at Exhibit P.W.9/A was drawn, in the presence of P.W.9 Manguesh Naik. The post-mortem report is at Exhibit P.W.3/A. P.W.3 Dr. Silvano Dias Sapeco found there was one obliquely placed oval shaped stab injury of 2 cms. length with a tailing of one cm. along upwards and left side. It was on the left side of the chest front just above the xiphisternum. The lower border was 20 cms. above navel and the upper border was 12 cms. below inner end of left collar bone. The injury was fresh at the time of death and was caused by

impact of sharp and pointed weapon. On internal examination he found that there were cuts for costal junctions of 7th and 8th ribs for 3 cms.. Thereafter, there were cuts on the anterior aspect of the pericardium for 3 cms. and had cut the right ventricle for 2 x 1/2 x 1/2 cms. and had entered its cavity upto 4 cms. deep. The total depth from skin, chondral aspects upto heart was 6 cms.. P.W.3 Dr. Sapeco, therefore, opined that death was due to haemorrhage and shock as a result of stab injury and was fatal in the ordinary course of nature. The viscera was forwarded to the Chemical Analyser, vide letter, at Exhibit P.W.3/B. He further opined that the knife M.O.8 could cause the fatal stab injury. The blood group of deceased was determined as 'A' Rh Positive, vide report, at Exhibit P.W.3/E. The clothes of the deceased came to be attached in the presence of P.W.8 Durga Naik, vide attachment panchanama Exhibit P.W.8/A. Vide attachment panchanama, at Exhibit P.W.14/A, a leaf of the plant known as 'elephant ear', which had blood stains, came to be attached, in the presence of P.W.14 Thereza Luis. On 21st December 1997, on the basis of the statement of the accused made in the presence of P.W.12 Alex Lourenco, knife (M.O.8) came to be recovered, vide panchanama, at Exhibit P.W.12/A. The said knife M.O.8 had been concealed in the hollow part of the roots of a banian tree. The muddemal property was forwarded to the

Central Forensic Science Laboratory, Hyderabad and the report of the Scientific Expert is at Exhibit P.W.21/A. After completion of the investigation a charge-sheet against the appellant came to be filed.

3. Vide Exhibit 7, the learned Sessions Judge, South Goa, Margao, framed a charge against the appellant/accused for an offence punishable under Section 302 of the Indian Penal Code. The appellant/accused denied his guilt and claimed to be tried. The prosecution in support of its case examined 21 witnesses. The learned trial Court accepting the prosecution case, convicted and sentenced the appellant as aforestated. Hence, the present appeal.

4. The prosecution has examined Anand Kamtekar as P.W.5, who had lodged the complaint, at Exhibit P.W.5/A. P.W.5 Anand states that he was earlier residing in the premises of P.W.1 Benny Fernandes and had been to the scene of offence on the day of the incident as he had come to pay the rent of Rs. 250/- to P.W.1 Benny. Since P.W.1 Benny was busy in seeing off his father to Bombay, P.W.5 Anand handed over the rent to the father of Benny. Father of P.W.1 Benny returned the said amount and told P.W.5 Anand to retain the amount for himself. After seeing off the father of Benny, P.W.5 Anand returned to Benny's house and met the deceased

Rama, who was a postman, and on the request of deceased Rama, he accompanied him to his room. Deceased Rama was residing as a tenant in the room of the premises of P.W.1 Benny. P.W.5 Anand and deceased Rama had tea and biscuits and then P.W.5 Anand told the deceased that he had to return. After he had left the room of deceased Rama and was at a distance of 10 metres from the room, he saw the accused coming from the opposite direction and going towards the room. He then heard the sound 'avoige avoige' (mother mother). P.W.5 Anand immediately turned round and saw deceased Rama holding his hand on the stomach and falling on the ground. P.W.5 Anand then went near deceased Rama and saw that he had a bleeding injury on his chest and, on hearing a sound, he turned and saw the accused running in the direction from where he had come. He shouted for help and a car was brought and deceased Rama was taken to the hospital. He has stated that the accused was known as Krishna and Vishnu also. He, thereafter, went to the police station and filed his complaint, at Exhibit P.W.5/A.

5. In the cross-examination he has admitted that after he shouted for help P.W.1 Benny came at the scene of offence. He has also admitted that he knew the accused by name and some times used to talk to him. He has further stated that deceased Rama was wearing a half

pant of white colour. He has also admitted that deceased Rama did not tell him anything neither did he ask deceased anything. He has further stated in the cross-examination that he was at a distance of about 4 to 5 metres from the room of deceased Rama when the accused crossed him and must have reached a further distance of 2 metres when he heard the sound 'mother mother'. The evidence of P.W.5 Anand is corroborated by the recitals in his complaint, at Exhibit P.W.5/A.

6. P.W.1 Benny states that close to his house there are 5 tenements in one building. The building is owned by him. Deceased Rama was working as a postman and was occupying one of the tenements. One Kalpana is occupying another tenement, one Anthony Fernandes is occupying another tenement, while Filomena Pereira is occupying the fourth tenement. He has further stated that he knew the accused as he used to come to the house of Kalpana. On the day of the incident, deceased Rama was residing alone in his tenement, as his wife had gone to her mother's house for delivery. He has then stated about the visit of P.W.5 Anand to his house for paying the balance amount of rent and his father asking P.W.5 Anand to retain the said amount. He further states that after seeing off his father, he went to his shop and then he heard Anand calling him by his name. He, therefore, went to the place from where Anand was

calling him and saw deceased Rama standing and placing his hand on the chest and uttering the words 'mother mother'. A neighbour had brought a car and Rama was taken to the Hospicio Hospital at Margao. P.W.1 Benny followed deceased Rama in his car to the hospital. He has further stated that in the hospital P.W.4 Sumati Naik, sister of deceased Rama, asked Rama as to who had assaulted him and Rama informed her that it was the accused. Deceased Rama was, thereafter, taken to the Goa Medical College, Bambolim.

7. In the cross-examination he has admitted that he and P.W.5 Anand went together to the police station. He has stated that he does not know when the statement of P.W.5 Anand was recorded. He has further clarified in the cross-examination that the oral dying declaration of the deceased was made when Rama was put in the ambulance for being taken to the Goa Medical College. He has also stated that Rama had only replied by giving the name of the accused without mentioning the surname. He has further admitted that blood was found in his room.

8. P.W.4 Sumati Naik, sister of deceased, states that on 21st December 1997, at about 4.00 p.m., when she was at home, her cousin P.W.11 Saroj Naik came and informed her that Rama had been stabbed with a knife and

was taken to the hospital. She alongwith her other brother Laxman and the wife of Laxman went to the Hospicio Hospital at Margao. She found that her brother Rama was being taken in the ambulance to the Bambolim Hospital. She asked deceased Rama as to who had assaulted him and deceased Rama replied that he was assaulted by one Krishna.

9. In the cross-examination she has stated that she was by the side of the stretcher and close to the head of her deceased brother. There were no bandages but only a piece of cloth tied to the stomach. Her deceased brother had told her only that Krishna had assaulted him. She has denied the suggestion that the deceased did not make any oral dying declaration.

10. P.W.7 Filomena Pereira, neighbour of deceased Rama, states that the distance between her house and the house of deceased Rama was about 15 to 20 metres approximately. At about 3.00 to 3.30 p.m., she heard some sound and went to the house of Rama and saw Rama coming out of the house. He had sustained a bleeding injury on his chest. After some time deceased Rama was taken to the hospital.

11. P.W.11 Saroj Naik states that the house where Rama was residing is at a distance of 30 to 40 metres

from her house. On the day of the incident, at about 3.15 p.m., she had gone to the house of P.W.1 Benny in order to meet Rosaria Fernandes. She heard some noise and, therefore, rushed towards the room of Rama Naik and saw Rama Naik near the entrance of his room. He had sustained a bleeding injury on his chest. She heard deceased Rama saying that he had been assaulted by Krishna. Rama was, thereafter, taken to the hospital.

12. P.W.16 Deepika Naik states that, on the day of the incident, at about 3.30 p.m., she alongwith her cousin P.W.17 Siddi were riding bicycle in front of the house of P.W.17 Siddi. At that time she heard somebody shouting 'mother' The shout came from the direction of the room of deceased Rama. They went near the room of deceased Rama and were at a distance of about 8 to 10 metres from the house of Rama Naik. She saw the accused coming out of the room of Rama Naik. The accused was having a knife in his hand, which was stained with blood. The accused wiped the said knife on the leaf of the elephant ear plant and, thereafter, he tucked the said knife in his trousers. The accused then ran towards the main road.

13. In the cross-examination she has further reiterated that the distance between the place where they were standing and the plant, on the leaf of which

the accused had wiped the knife, would be about 5 to 6 metres approximately. She has also admitted that she had seen the accused for the first time, on the day of the incident and, that too, for about a minute.

14. P.W.17 Siddi states about hearing the shout 'mother' and noticing a person running towards the road after wiping the knife on a big leaf. She had failed to identify the said person as the accused.

15. P.W.12 Alex Lourenco states, around 24th December 1997, he was called to the police station alongwith another witness named Arvind. He was introduced to an accused, who was in custody, who was the appellant. The accused had made a statement that he would point out the place where he had hidden the knife. He alongwith the other panch witness, the police and the accused proceeded to a place where the accused showed them a hay stack. There was a banian tree by the side of the hay stack. The accused then took them to the banian tree and pointed out the knife, which was hidden in the hollow part of the roots of the said tree. The said knife was attached. The statement and the panchanama is at Exhibit P.W.12/A.

16. In the cross-examination he has admitted that P.I. Patre had told him that a knife was to be

recovered. However, according to him, this was told after the accused had made the statement. He has also admitted that the handle of the knife was visible, eventhough the blade was concealed in the hollow part of the banian tree. He has also admitted that the knife was a kitchen knife, which has only one sharp edge. P.W.3 Dr. Sapeco, who had conducted the post-mortem examination, had admitted that it is possible that after the person receiving the injury, he may not be in a position to speak depending, however, on the state of his mind.

17. Mr. Rohit Bras De Sa, the learned counsel appearing on behalf of the appellant and who has very ably argued the appeal, has urged before us: (1) that the case rests on circumstantial evidence and the circumstances, so proved by the prosecution, do not exclude the hypothesis of the innocence of the accused and do not unerringly point to the guilt of the accused; (2) he has further urged before us that, in view of the discrepancies in the evidence of P.W.1 Benny and P.W.4 Sumati regarding the exact place where the oral dying declaration was made, it would be highly unsafe to rely on the oral dying declaration. The learned counsel has further urged that the evidence of P.W.16 Deepika is unreliable in the absence of any test identification parade; and (3) the learned counsel further has urged

that the evidence of P.W.12 Alex, in respect of discovery of the knife M.O.8, at the behest of the appellant, cannot be accepted as the recovery was from an open place and also in view of the fact that the handle of the knife was visible. The learned counsel, therefore, submits that the appellant has been convicted without there being any legal basis and is, therefore, entitled to be acquitted.

18. Mr. Sardessai, the learned Public Prosecutor appearing on behalf of the respondent/State, has submitted: ((1) that the prosecution has proved each and every circumstance on which it relied and the circumstances, so proved, form a complete chain which excludes every hypothesis of the innocence of the accused while unerringly points to the guilt of the accused; (2) the learned counsel for the State has further submitted that the slight discrepancies in the evidence of P.W.1 Benny and P.W.4 Sumati have been properly explained by P.W.1 Benny in the cross-examination and, therefore, the oral dying declaration can be safely accepted. In respect of the evidence of P.W.16 Deepika, the learned Public Prosecutor has stated that the evidence of P.W.16 Deepika has to be read alongwith the evidence of P.W.5 Anand and even if P.W.16 Deepika has identified the accused for the first time in Court, her evidence

corroborates the evidence of P.W.5 Anand; and (3) he has also urged that the evidence in respect of the discovery of the knife is cogent and reliable. He, therefore, submits that the appeal is sans merit and deserves to be dismissed.

19. It is true that P.W.1 Benny in his examination-in-chief has stated that the oral dying declaration was made to P.W.4 Sumati Naik in the hospital. However, in the cross-examination, he has stated that the oral dying declaration was made by the deceased when he was kept in the ambulance for being taken to the Goa Medical College, Bambolim. P.W.4 Sumati has also stated that the oral dying declaration was made when the deceased was being taken in the ambulance to the Bambolim Hospital. The discrepancy in respect of the exact place where the oral dying declaration was made by the deceased to P.W.4 Sumati no longer exists, in view of the answer elicited in the cross-examination. The version of P.W.4 Sumati is amply corroborated by P.W.1 Benny and we, therefore, have no hesitancy whatsoever in accepting the oral dying declaration made by the deceased to P.W.4 Sumati. In the oral dying declaration the deceased had stated that it was Krishna who had assaulted him. It has been brought on record that the accused, who is called 'Vishnu', is also known as 'Krishna'. The evidence of

P.W.5 Anand is that the accused had crossed him on the way and had entered the house of deceased Rama and, thereafter, he heard the cries of deceased Rama and had seen deceased Rama coming out of the room profusely bleeding. Thereafter, he had seen the accused leaving the room of deceased Rama. This circumstance of the accused entering the room of Rama and Rama thereafter raising cries and coming out of the room with a bleeding injury and the accused leaving the room of deceased Rama unerringly points a finger towards the guilt of the accused. Thus, though the surname of the accused is not stated in the oral dying declaration, according to us, the importance of the dying declaration is not whittled down on that score and the reference to the accused as 'Krishna' unerringly refers to the appellant and none else. The evidence of P.W.5 Anand is then corroborated by the evidence of P.W.16 Deepika and P.W.17 Siddi when they had seen a person coming out of the room of deceased Rama, wiping the blade of the knife on the leaf and then running towards the road. Though P.W.16 Deepika did not know the accused prior to the incident and has identified the accused for the first time in Court, according to us, the evidence of P.W.16 Deepika does not lose any importance as the circumstantial evidence suggests that it was the accused, who had come out of the room of deceased Rama. P.W.16 Deepika further states regarding the accused wiping the knife on

the leaf. The said leaf came to be attached, vide attachment panchanama Exhibit P.W.14/A and the report of the Chemical Analyser shows that it was stained with blood of 'A' group, which group has been determined to be belonging to the deceased. The knife M.O.8 also is shown to be stained with human blood, though the group could not be determined. Therefore, according to us, the prosecution has been able to establish the following circumstances: (1) the accused entered the room of deceased Rama; (2) immediately thereafter deceased Rama cried and came out of the room with a bleeding injury; (3) accused was seen leaving the room of deceased Rama immediately thereafter; (4) accused was seen wiping the blood stained knife on a leaf of a plant; (5) the leaf of the plant is stained with blood of the blood group of the deceased; and (6) an oral dying declaration was made by the deceased to P.W.4 Sumati that it was the accused, who had assaulted him.

20. We have, however, reservation in accepting the oral dying declaration made by deceased Rama to P.W.11 Saroj. According to P.W.11 Saroj, after deceased had come out of the room, he had stated that it was the accused who had stabbed him. This oral dying declaration is not corroborated by P.W.1 Anand, who was the first person at the scene of offence and is also not corroborated by P.W.7 Filomena. In fact,

according to P.W.5 Anand, the deceased had not stated anything nor he was asked anything, meaning in respect of the injury. We, therefore, find that the evidence of P.W.11 Saroj in respect of the oral dying declaration is far from satisfactory and we, therefore, reject her evidence.

21. It is true that the evidence of P.W.12 Alex suggests that the handle of the knife was visible. However, P.W.21 P.I. Patre has stated that 'the handle of the knife was visible to the naked eye only if one stood very close to the bark of the tree'. Though the knife is undoubtedly recovered from an open place, no doubt accessible to all, the recovery, at the behest of the accused, cannot be disbelieved on that score alone. The knife was hidden and was not visible to the naked eye unless one peered very closely at the tree. The accused can, therefore, be said to be in exclusive knowledge and the inference that can be drawn is that it was the accused who had hidden the knife. P.W.3 Dr. Sapeco had stated that the knife M.O.8 could cause the fatal stab injury. The knife was also found stained with human blood. No explanation worth the name has been tendered by the accused. We, therefore, see no reason to reject this piece of circumstantial evidence. Therefore, according to us, the prosecution has established the recovery of the knife M.O.8 at the

instance of the accused.

22. We have given our anxious consideration to the submissions made on behalf of the accused and after perusal of the record we find that the prosecution has been able to establish the offence against the appellant/accused beyond reasonable doubt. The appeal of the appellant/accused is, thus, devoid of any merit and deserves to be dismissed and is, accordingly, dismissed.

(A.M. KHANWILKAR)
JUDGE.

(P.V. HARDAS)
JUDGE.

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